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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 751

ROY T. MOBLEY,

Appellant,

versus

NEW YORK LIFE INSURANCE COMPANY,

Appellee.

BRIEF FOR APPELLANT.

May It Please the Court:

There was no official report of the opinion of the District Court but his opinion that was delivered on the application for a directed verdict is found at page 138 of the Record.

The official opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in Vol. 74, (2d) Fed. Rep. 588; Advance Sheets dated March 11th, 1935, and found in the record at page 151, *et seq.*

STATEMENT OF THE CASE.

The case comes from the Southern District of Mississippi in which the trial court peremptorily instructed the jury to return a verdict for the defendant. There were two suits based on two separate policies of insurance issued by the New York Life Insurance Company to the appellant which carried certain disability benefits. For the purposes of trial the two suits were consolidated.

Appellant's declaration in the first suit is found at (Record 1 to 3, inc.) and a copy of the policies of insurance sued on is found (Record 3 to 25, inc.), the two policies of insurance being the same except as to the amounts payable thereunder.

The suits were for a breach of contract and alleged that while the policies were in force the appellant became totally and permanently disabled and thereby became entitled to monthly disability benefits and a waiver of the premiums. That the company waived the premiums and paid the disability benefits up until January 13th, 1933, but thereafter it wilfully and wrongfully declined to make any further payments and notified him on March 1st it would not make any further payments under either of said policies.

That on March 9th, appellant employed attorneys to represent him and his attorneys made demand on the defendant for the breach of the contract and that on March 17th defendant company re-affirmed its former decision and notified the appellant's attorney that it declined to make any further disability payments.

Appellant further averred that at the time he was totally and permanently disabled and would be the remainder of his life, and further averred that the defendant refused to make payment of the premium or waive the premium that had become due on February 2nd, 1933. The policy provided for furnishing due proof of disability (Record 4), and the payment of semi-annual premiums (Record 4); it provided that double indemnity and disability benefits shall not apply to temporary insurance or paid up insurance provided under surrender values of the policy (Record 5 and 7), and upon proof being submitted provided for the waiver of premiums and payment of disability (Record 6): "*Before making any income payment or waiving any premium, the Company may demand due proof of the continuance of total disability but such proof will not be required oftener than once a year after such disability has continued for two full years.*" (Italics ours).

"Upon failure to furnish such proof, or if the Insured performs any work * * * no further income payments shall be made nor premiums waived." (Record 6 and 7).

And further provided that after any default it could be reinstated on furnishing proof of good health (Record 9); and provided in the event of default of payment of premium after three years then certain benefits would apply (Record 14).

On the trial of the cause it was admitted that appellant had been continuously, totally and permanently dis-

abled within the meaning of the policy up until the date of the trial since his operation for appendicitis (Record 125). He was operated on for appendicitis December 1930, (Record 77).

The defense was that the company had not denied liability but had simply suspended payments under the policy and after the matter had been taken up by the attorneys for the petitioner with the company it later determined that it was in the wrong, and made a tender of past due installments to the appellant, which having been refused by the appellant it tendered into court (Record 40-41).

Appellant's replication to this special plea was to the effect that the company had totally breached its contract and re-affirmed its breach by its letter dated March 17th, which letter is shown (Record 116), and by letter of April 13th, 1933 (Record 117), and by letter of June 5th, 1933 (Record 118), and that appellant being entitled to performance of the contract the appellant thereby had the right of election to either treat it as breach and sue for breach of the contract measured by the present cash value of all benefits under the policy under his life expectancy or he had the right to accept the monthly payments and he elected to pursue the remedy for a breach of the contract. Replication is found (Record 44, *et seq.)*.

The trial court peremptorily instructed the jury to return a verdict for the defendant (Record 138). The case was carried to the Circuit Court of Appeals and affirmed on January 16th, 1935 (Record 156).

SPECIFICATIONS OF ERROR URGED.

Specification No. 1 (R. 147):

The lower court erred in finding and holding that the jury should be peremptorily instructed to find a verdict for the appellee (Record 138), because:

A. The letters dated March 1st, 1933 (Record 113), March 17th, 1933 (Record 116), letter dated April 13th, 1933 (Record 117), and letter dated June 5th, 1933 (Record 118) showed a positive and unequivocal breach of the contract at a time when the appellant was totally and permanently disabled and entitled to monthly disability benefits as shown by its letters in its file at the time that he was totally and permanently disabled, and on the trial admitted that he was totally and permanently disabled on the above dates. (Record 125).

B. No conduct of the defendant company if it had breached its contract could deprive the appellant of his right to claim full damages for the breach.

Specification No. 2:

The court below erred in finding and holding that in the instant case there was not a clear and unequivocal repudiation by the promisor of its agreement with the appellant. (Record 138).

ARGUMENT.

Points of Fact:

The facts are, that on March 1st, 1933, the appellant was totally and permanently disabled within the meaning of the policy, and had been since December 13th, 1930, when he was operated on for appendicitis. (Record 125). Prior to March 1st, 1933, the company had been paying his disability benefits under the policy and had waived the premiums, but on several occasions had notified him that it was not going to make any further payments and that it would not waive further premiums, by letter dated July 6th, 1931 (Record 49), letter of July 11th, 1931 (Record 50), letter of September 25th, 1931 (Record 58). However, the payments during this year were finally reinstated on October 9th, 1931, and on October 12th, 1931. (Record 60 and 61). On March 19th, 1932, it again advised him that no further payments would be made (Record 65), and that the premium had to be paid, but on April 20th, 1932, it agreed to give further consideration to his claim (Record 65), and on May 16th, 1932, the payments not having been resumed, appellant wrote the company that unless payments were resumed by the end of that week he would file suit in George County. (Record 104).

On May 21st, 1932, payments were again resumed and the past due installments paid. (Record 105). On December 17th, 1932, not having received his payment appellant wrote the company that he must have some definite information from it about the payment then due (Record 106), to which the company replied on December 27th, 1932, that the payment was being approved (Record 67), and on

January 19th, 1933, it wrote him a letter asking information as to his condition (Record 68), to which he replied that he was totally disabled. (Record 68-69-70). Not having received a reply to his letter appellant wrote the company on February 22nd, 1933, asking for the payment then past due. (Record 70). On February 28th, 1933, he advised the company by letter that unless they paid him immediately he would assume that they were denying liability (R. 70); March 1st, 1933, it replied, denying further liability. (Record 113). On March 6th, 1933, appellant wrote the company he was taking legal steps to secure his benefits (Record 71), and on March 9th, 1933, appellant's attorneys wrote the company advising it of their employment and making demand for a breach of the contract (Record 114-115), to which the appellees replied on March 16th, 1933 (Record 115), and further reply of March 17th, 1933, adhering to its former decision not to waive any further premiums or pay any more benefits. (Record 116-117).

The reports of doctors who had examined the appellant showed that he was totally disabled. See reports of Dr. Shands (Record 80), Dr. Currie (Record 81-90), Dr. Huggins, who was the company's own examiner for Mississippi (Record 83-87-93-98-111-112-113), report of Dr. J. E. Beck dated May 4th, 1932, in which Dr. Beck tells the company that at that time appellant was suffering with his heart (Record 102), report of Dr. Dossett dated May 12th, 1932 (Record 103-104).

The reports of appellant himself to the company showed unmistakably that he was totally disabled. (Record 50-51-68-69-70-77-82-106-109-110).

The appellee having agreed that he was disabled up until the date of the trial (Record 125), appellant then introduced medical testimony showing that he was totally and permanently disabled forever and would not ever be able to resume any kind of work for remuneration. See testimony of Dr. Beck (Record 74-75); also testimony of Dr. F. S. Gay (Record 126); testimony of Dr. E. A. Copeland (Record 127).

Appellant further showed that if appellant should be relieved of worries from a financial standpoint and could receive complete rest it would prolong for a greater length of time his life (Record 75), and that if he should have proper treatment, proper rest and relief from worry and financial troubles that he could expect to live practically the normal length of his life. (Record 126-127).

Appellant was 32 years old in June, 1934 (Record 125), being 31 years old in March, 1933, when the policy was breached. Appellant showed the life expectancy of a man 31 years old to be 34.63 years. (Record 128). He showed the value of the two policies as of March 13th, 1933, to be $21,309.84 (Record 130), and the interest computed on that amount to the date of trial makes $22,559.99. (Record 130).

The points of facts summarized are:

1. Appellant had two policies carrying disability benefits.
2. He became totally and permanently disabled while they were in force.

3. The policies carried mutual obligations.
   (A) The duty of the company to pay.
   (B) The duty of appellant to furnish due proof of his disability when demanded by the company, which right the company had.
4. The company absolutely repudiated its obligations under the policies.
5. Appellant showed that his disability will be forever.
6. Appellant showed his life expectancy and the present value of the policies.

Points of Law.

Specification No. 1:

It was error for the lower court to direct the jury to return a verdict for the defendant. Upon an application for a directed verdict all of the evidence for the plaintiff, together with all reasonable inferences therefrom is to be taken as true.

Maryland Casualty Co. v. Millie R. Jones, 279 U. S. 792, 73 L. Ed. 960.
Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720.
Chesapeake & Ohio R. R. v. Martin, 283 U. S. 209, 75 L. Ed. 983.
U. S. F. & G. Co. v. Wilson, 41 Fed. (2d) 319.
Central Trust Co. of Ill. v. Chicago Auditorium Association, 240 U. S. 581, 60 L. Ed. 811.

A.

Taking all of the evidence with reasonable inference therefrom as true the company had unequivocally breached its contract and the appellant then had the right of election

as to whether he would sue for an entire breach of the contract and recover all damages in one suit or he could have sued monthly as each installment fell due, and having elected to sue for a breach of the contract the company could not deprive him of that right by reconsidering its position and tendering benefits.

Pearce v. Tenn. Coal & Iron R. R. Co., 173 U. S. 1; 43 L. Ed. 591.

Roehm v. Horst, 178 U. S. 1; 44 L. Ed. 953.

Anvil Mining Co. v. Humble, 153 U. S. 540; 38 L. Ed. 814.

Lovell v. St. Louis Mutual Life Ins. Co., 111 U. S. 264; 28 L. Ed. 423.

Vicksburg & M. R. R. Co. v. Putnam, 118 U. S. 545; 30 L. Ed. 257.

Fed. Life Ins. Co. v. Rasco, 12 Fed. (2d) 693.

Mutual Reserve Fund Life Assurance Co. v. Farrenbach, 75 C. C. A. 304; 144 Fed. 342.

Colorado Yule Marble Co. v. Collins, 144 C. C. A. 376; 203 Fed. 78.

United Press Assn. v. National Newspaper Assn., 150 C. C. A. 429.

Aetna Life Ins. Co. v. Gehr, 50 Fed. (2d) 657.

Prudential Ins. Co. of Am. v. Faulkner, 68 Fed. (2d) 676.

Aetna Life Ins. Co. v. Phiefer, 160 Ark. 98; 254 S. W. 335.

Avery v. Boden, 5 E. L. & B. L. 714.

Barrick v. Buba, 2 C. B. N. S. 563.

Benjamin v. Hilliard, 23 Howard, 149.

Corpus Juris, Vol. 13, Section 725, page 651.

Daniels v. Newton, 114 Mass. 530.

Danube & B. S. R. R. Co. & K. Harbour Co. v. Xenos, 11 C. B. N. S. 152.

Danube & B. S. R. R. Co. & K. Harbour Co. v. Xenos, 13 C. B. N. S. 825.

East Tenn. V. & G. R. R. Co. v. Staub, 7 Lee, 397, (Tenn.).
Grau v. McVicker, 8 Biss 13, Fed. Case 5708.
Hancock v. New York Life Ins. Co., Fed. Case 6011.
Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264, 30 L. Ed. 967.
Hochster v. De La Tour, 2 E. L. & B. L. 678.
Indiana Life Endowment Co. v. Reed, 54 Ind. App. 450, 103 N. E. 77.
Miburn v. Royal Union Mutual Life Ins. Co., 209 Mo. App. 228; 234 S. W. 378.
Nichols v. Scranton Steel Co., 137 N. Y. 487; 33 N. E. 566.
Pakas v. Hollingshead, et al., 184 N. Y. 211; 77 N. E. 40.
Parker v. Russell, 133 Mass. 74.
Reid v. Hoskins, 6 E. L. & B. L. 593.
Schell v. Plumb, 55 N. Y. 592.
Travelers Protective Assn. of Am. v. Stevens, 49 S. W. (2d) 365.
Hamilton v. Love, 152 Ind. 641; 53 N. E. 181.
9 Cyc. 635.
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National Life & Accident Ins. Co. v. Whitfield, 53 S. W. 10.
Atlas Life Ins. Co. of Tulsa v. Bolling, 53 S. W. 1.
Richards on Law of Ins., 4th Ed. 580, Sec. 342.
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R. C. L. Vol. 6, 1023, Sec. 384-385-389.
Reed Bros. v. Bluff City Motor Co., 139 Miss. 441; 104 So. 161.
Leek Milling Co. v. Langford, 81 Miss. 728; 33 So. 492.
Bolling v. Red Snapper Sauce Co., 97 Miss. 785.
Bu-Vi-Bar Petroleum Corp. v. Krow, et al., 40 Fed. (2) 488.
Carter v. Witherspoon, 126 So. 388.

The contract was one carrying mutual obligations. The company could demand due proof of continuance of total disability and could enforce this obligation of the contract by refusing further payment or waiving any further premiums. See the policy (Record 6-7), being a contract of mutual obligations.

When it unequivocally breached its contract, then under the authorities above cited appellant had the right to sue for a total breach. On March 1st, 1933, the company did not suspend payments but it breached its contract when it was in full force, all the facts showing the appellant was entitled to performance. It did not say it was suspending payments but informed him that no further payments would be made and that premiums on both policies due on and after February 7th, 1933, became payable in conformity with the terms of the contract. (Record 113-114). Then re-affirmed this in unmistakable language at the conclusion of its letter of March 17th. (Rec. 116-117). Then, to make it still stronger, it notified him on the 13th of April, 1933, that one policy had already lapsed for the non-payment of premiums and urged him to reinstate the policy which would have required a showing of good health. (Record 117). Then on June 5th, appellant not having applied for reinstatement it applied the value of the policy as temporary insurance. (Record 118). This temporary insurance, however, was entirely a different contract as the disability benefit and double indemnity benefit provision of the policy did not apply to this temporary insurance. (Record 5-7), so that there was a positive unequivocal breach of the contract. The breach of contract having been completely shown appellant was entitled to recover such dam-

ages as he had suffered by the breach, and is only required to prove these with reasonable certainty.

Pearce v. Tenn. Coal & Iron R. R. Co., 173 U. S. 1; 43 L. Ed. 591.

B.

No conduct of the defendant company after it had breached its contract could deprive appellant of his right to claim full damages for the breach. Appellee completely repudiated its contract on March 1, 1933, and re-affirmed it on March 17th, 1933, and again on June 5, 1933, and the appellant having elected to treat it as a breach and employed his attorneys had thereby changed his position and elected, as he had a right to do, to demand full damages for the complete breach, and having changed his position, the company cannot then be heard to say that it would like to change its position and tender benefits. This right belonged to the appellant.

Pearce v. Tenn. Coal & Iron R. R. Co., 173 U. S. 1; 43 L. Ed. 591.
Roehm v. Horst, 178 U. S. 1; 44 L. Ed. 953.
Holloway v. Griffith, 32 Iowa, 409.
Bu-Vi-Bar Petroleum Corp. v. Krow, et al., 40 Fed. (2) 488.

Specification No. 2:

The lower court erred in finding and holding, R. 138, that in the instant case there was not a clear and unequivocal repudiation by the promissor of its agreement, and held that the defendant company had not unequivocally repudiated the contract and that appellant had done all he was required to do and the contract was therefore executed

on his part. The Circuit Court of Appeals likewise held that there was not a repudiation but only a suspension of payments. (R. 155). If that holding were correct, then appellant would not be entitled to recover for a breach, but if there was an unequivocal breach then appellant would be entitled to recover.

An examination of the record will demonstrate clearly that the lower courts were in error in so finding.

Prior to March 1st, 1933, appellee on three occasions had notified appellant it would make no further payments but after threatened suit by the appellant it re-considered and admitted its error and resumed payments. In December, 1932, it had suspended payment and after several letters heretofore referred to, passed between appellant and appellee it called on him in January, 1933, for further proof of his continued disability. At that time it had in its files positive and undisputed proof that appellant was totally disabled, and on December 17th, 1932, appellant wrote the company, (Record 106), his condition, and on January 19th, 1933, the company sent appellant its questionnaire (Record 68 to 70) and in response thereto appellant answered it fully showing his total disability, and on January 24th, 1933, its own examiner from Mississippi, Dr. Huggins, reported (Record 111-112) that appellant had heart trouble and had been prevented by reason of his disability from working since December 13th, 1930, and that he had low blood pressure, complains of indigestion, no energy, weakness, and that Dr. Beck had advised him not to do any work of any nature. Diagnosis, heart trouble; and the company then wrote Dr. Huggins for further in-

formation and he replied (Record 112-113) that he did not think appellant could follow any occupation requiring mental or physical strain, and on December 22nd, 1932, it had the report of its private investigator, (Record 107-108), in which it was stated that the investigator had not seen him for several months and that he was apparently sick. That Dr. Copeland of Jackson was his attending physician and that appellant had told informant on the phone that day that he had never recovered from his operation for appendicitis. With all of this information in its file and with full knowledge that it had been in the wrong three times prior to March 1st, 1933, and without any information that he was able to go to work, it arbitrarily and in language as plain as can be used, told him in its letter of March 1st it was not going to make any further payments and he would have to pay all premiums due on and after February 7th, 1933. It did not call on appellant for any further reports of his condition. It did not call on Dr. Copeland for another report and it was agreed (Record 125) that none of the confidential reports' contents or the doctors' reports made to the company concerning appellant were ever made known to him before he filed his suit. Then, when the matter was taken up with the company by his attorneys it replied on March 17th after going through its files it adhered to its former decision and followed this up with the positive declaration to appellant that he had not paid his premium and the policy had therefore lapsed and it had applied the value of the policy to temporary insurance, which as a matter of fact entirely repudiated the contract because the temporary insurance did not carry disability benefits nor double indemnity benefits.

We are unable to conceive a more unequivocal breach of its contract than was committed by the company in this case. We do not see where language any stronger or conduct any more forceful could have been used than it did use. Therefore, when the company committed the breach the appellant then had the right of election.

In the *Roehm* case, cited *supra*, the court said:

> " • • • And also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly." • • •
>
> "It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind."
>
> "The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." • • •
>
> "Its real operation appears to be to give the Promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract, to wait till the time for its perform-

ance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such." • • •

"In *Anvil Mining Co. v. Humble, 153 U. S. 540, 38 L. Ed. 814, 14 Sup. Ct. Rep. 876*, performance had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the Court, said: 'Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.'"

The case of *Federal Life Ins. Co. v. Rasco, 12 Fed. (2d) 693, 71 L. Ed. 859*, in which certiorari was denied, by this court, was correctly decided by the *C. C. A.*, and is on all fours with the instant case. In that case the court said:

"This is a single contract. The fact that defendant is required to perform in part at stated intervals does not change its unitary character into a multiplicity of contracts, each relating to but one installment. If there has been an actual breach, coupled with repudiation, of this one contract, then, to avoid a multiplicity of suits, public policy requires that plaintiff may maintain but one action for the entire damages occasioned by such breach."

In the instant case there was an actual breach when it refused to pay at a time when it was under duty to pay. There was a complete repudiation when it lapsed the policy and applied its value to a different kind of contract and also announced that all premiums on the other policy after February 7th, 1933, would have to be paid. This was done, at a time when it had no right to do so as it now admits. The contract of insurance in the instant case is a single contract so stated by its own terms. (Record 18):

In the case of *Pearce v. Tenn. Coal & Iron R. R. Co., supra*, the court uses this language:

> "The defendant committed an absolute breach of the contract **at a time when the plaintiff was entitled to require performance.** The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into its service; or to resort to successive actions for damages from time to time; * * * **he had the right to elect to treat the contract as absolutely and finally broken by the defendant** (emphasizing ours); to maintain this action, once for all, as for a total breach of the entire contract."

Appellee will urge among other things that the case of *Metropolitan Life Ins. Co. v. Lambert, 128 So. 750, 157 Miss. 759*, and the case of *Atlantic Life Ins. Co. v. Serio, 157 So. 470*, a Mississippi case, are controlling on this court as expressing the policy of Mississippi.

While the court in the *Serio* case announced it would not follow the *Rasco* case it was not necessary for the court to make that statement to a decision of the *Serio* case. In

the *Serio* case the insurance company was undertaking to take advantage of its own wrong, contending it had notified Serio it repudiated the policy and would not be bound under it any longer in 1927. The Mississippi court overlooked the fact that the right of election was given to the insured to see whether he would sue for a total breach or whether he would sue monthly, and the right is not given to the promissor and therefore the insurance company could not invoke the principle announced in the *Roehm* case and the *Rasco* case hereinbefore cited.

The *Lambert* case has no application for the reason that the suit was not based on a total repudiation of the contract of insurance but as stated by the court in that case the declaration alleged the failure of the appellant to pay any of the monthly installments accrued under the policy. While the prayer of the declaration in the case was for total sum of $2000.00 an examination of the opinion shows that it did not sue for the present cash value of all of the benefits he was entitled to under the contract and if the court meant to hold that a party could not recover for a total breach of the contract it was *dictum* for the reason that the pleadings did not justify this announcement. However, if the matter was properly before the Supreme Court of Mississippi and that is its holding, yet, such holdings are in conflict with the decisions of this court and is not binding on this court.

The case of *Mutual Life Ins. Co. of New York v. Johnson*, decided by this court on December 3rd, 1934, and reported in Advance Sheets of Law Ed. Advance Opinions, *Vol. 79, page 127*, is not applicable for the reason that the question here is a general principle of the law of contracts

of insurance and the decisions of this court will control over the decisions of a court of the State and is governed by the principles of law announced by this court in *Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 58 L. Ed. 356; Carpenter v. Providence Washington Ins. Co., 16 Pete, 495, 10 L. Ed. 1044; Kuhn v. Fairmont Coal Co., 215 U. S. 349, 54 L. Ed. 228; Bu-Vi-Bar Petroleum Corp. v. Krow, et al., 40 Fed. (2) 488.*

CONCLUSION.

Appellee contended in the courts below, and will probably contend here that to enforce the doctrine of anticipatory breach to claims of this character would lead to consequences difficult to foresee, and the Circuit Court of Appeals in its opinion stated that if appellant were allowed a present recovery for all further benefits the calculation on which insurance business is done would be upset, and the purposes for which the benefits were made payable only in installments would often be defeated. The reply to this reasoning is that if the insurance companies writing these disability benefit policies would carry out their contracts there would be no occasion for a suit on an anticipatory breach, and in the instant case refused to waive all premiums due after February 7th, 1933.

If the company in this case had kept an open mind and advised appellant that it wanted additional proof and given him the benefit of the information it had, then appellant would have had no cause of action but in this case the company did not do that. It kept from him the report of its confidential adviser and the report of its own physician,

and without any cause or reason whatever advised him that all premiums would become due and payable by him after February 7th, 1933, and that no further disability benefits would be paid, and this was done at a time when the appellant did not know why, and at a time when he was entitled to performance, and instead of keeping an open mind and seeking further information it carried out its threats and did lapse his policy just as it said it would do. Appellant, having changed his position by employing his attorney, and taking action was not then required under the law to accept the tender made by the appellee.

We therefore respectfully submit that the cause should be reversed and remanded.

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